

SEALASKA CORP.

IBLA 88-344

Decided July 19, 1990

Appeal from a decision of the Alaska State Office, Bureau of Land Management, rejecting cemetery site application AA-10484.

Affirmed.

1. Alaska Native Claims Settlement Act: Conveyances: Cemetery Sites and Historical Places

Sec. 14(h)(1) of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1613(h)(1) (1982), authorizes the Secretary of the Interior to withdraw and convey existing historical places and cemetery sites to the appropriate regional corporation. A cemetery site application is properly rejected under 43 CFR 2653.5 when there is no evidence that the site is the burial place of one or more Natives.

2. Administrative Procedure: Burden of Proof--Alaska Native Claims Settlement Act: Conveyances: Cemetery Sites and Historical Places

A party challenging BLM's rejection of a cemetery site selection application under sec. 14(h)(1) of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1613(h)(1) (1982), bears the burden of establishing by a preponderance of the evidence that such rejection is in error.

3. Administrative Procedure: Hearings--Alaska Native Claims Settlement Act: Conveyances: Cemetery Sites and Historical Places--Rules of Practice: Hearings

A hearing is not necessary in the absence of a material issue of fact, which, if proven, would alter the disposition of the matter. A hearing is not necessary where the dispute does not involve facts, but involves the proper application and interpretation of those facts, and BLM properly reviewed the same information submitted to this Board.

APPEARANCES: Stephen F. Sorensen, Esq., Juneau, Alaska, for appellant; Dennis J. Hopewell, Esq., Deputy Regional Solicitor, Office of the Regional Solicitor, Anchorage, Alaska, for the Bureau of Land Management and the Bureau of Indian Affairs.

OPINION BY ADMINISTRATIVE JUDGE IRWIN

Sealaska Corporation (Sealaska) has appealed from a decision of the Alaska State Office, Bureau of Land Management (BLM), dated March 7, 1988, rejecting cemetery site application AA-10484, filed on December 12, 1975, pursuant to section 14(h)(1) of the Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C. § 1613(h)(1) (1982). In this application, Sealaska selected 14 acres of land referred to as the "Goddard Burial Site," within sec. 17, T. 58 S., R. 63 E., Copper River Meridian, Alaska.

On June 23, 1975, Wilsey & Ham, Inc., consultants from Seattle, Washington, investigated the Goddard Burial Site. In its report, an excerpt from which Sealaska attached to selection application AA-10484, Wilsey & Ham stated that the "[i]sland had one burial marker about 3 feet high," and that "[h]ot springs had no remains from Indian settlement." Wilsey & Ham's report also stated: "Majority of remains were from subse-quent usage by a commercial venture. Gas barrels and miscellaneous metal parts along with several collapsing buildings and a sole fireplace were found. Any Indian remains appear to have been obliterated."

BLM forwarded Sealaska's application to the ANCSA Projects Office of the Bureau of Indian Affairs (BIA) for investigation. In its "Report of Investigation" BIA stated that "[t]he hot springs area was used extensively for bathing by local Natives," and that "[w]ater from the springs was used both for baths and to heat the former hotel built by Dr. Goddard in 1916" (Report of Investigation at 6-7). Further, BIA noted that Sealaska's application appeared to be "in conflict" with a homestead patent, issued April 23, 1924, covering a 28-acre tract of land surrounding the hot springs area, but that "a careful review of the Master Title Plat revealed that the site was located on a small island which is not part of USS [United States Survey] 1401." *Id.* at 7. Since Sealaska's primary argument on appeal to the Board is that BIA's investigation of the Goddard Burial Site was inadequate, we set forth BIA's "investigative findings" below:

The small island off shore from the old hot springs site was easily located. A thorough reconnaissance revealed several metal barrels and remains of the original boat docks. The bridge which connected the island to the mainland was completely deteriorated.

The only other feature located was a piece of 2-inch by 8-inch milled lumber, which was stuck vertically into the ground. Although Sealaska's application mentions a burial marker on this island, BIA and CPSU [Cooperative Park Studies Unit, National

Park Service] personnel did not believe this to be a Native grave marker for the following reasons:

1. The ground revealed no sign of a depression normally related to the burial of a body or casket.
2. The area around the marker was sloped, with level ground nearby.
3. The piece of lumber appeared to have been cut and planed, and was much newer than any mortuary poles or markers investigated during past seasons.
4. There was no inscription or marking of any kind on the board.
5. A close inspection of the immediate area showed no trace of a cross member or members as used on Christian or Orthodox crosses.
6. The board appeared to be approximately the same age as the lumber used on the boat dock and was in the vicinity of the remains of the dock. Since the dock was built after the Natives had been driven from the land, it is doubtful that the object is a Native or non-Native grave.

(Report of Investigation at 7-8).

On October 24, 1983, BIA issued a certificate of ineligibility for the Goddard Burial Site as a cemetery site, giving the following reasons:

1. Extensive field investigation by BIA personnel failed to find any evidence supporting the claim of a cemetery site.
2. The site as applied for is entirely within patented land, U.S. Survey 1401.
3. A second investigation on an adjacent island failed to uncover any evidence of a cemetery site.

On July 27, 1987, Sealaska submitted to BLM a study prepared by the Chilkat Institute entitled "Assessment of Twelve Sealaska Corporation Historical Site Applications Under the Alaska Native Claims Settlement Act 14(h)1" (Chilkat Assessment). The purpose of this study was to present "new information" to demonstrate that BIA's certificates of ineligibility pertaining to 12 selection applications, including selection application AA-10484 for the Goddard Burial Site, were based upon incomplete information.

With regard to the Goddard Burial Site, the Chilkat Institute noted that "Wilsey & Ham * * * located the site on the mainland in the area of the hot springs, which is a patented lot, when in fact the applied-for site should include only the small island opposite" (Chilkat Assessment at 47). ^{1/} The Chilkat Institute asserts that "[h]istorical and oral accounts establish that there was long-term prehistoric use of the hot springs, indicating that a burial would be very likely in the area." *Id.* The Chilkat Institute proceeds to discuss the historical use of the hot springs area for medicinal purposes. An informant named Mary Williams stated that "many people" lived in the hot springs community, with "many houses and smoke houses," and that "[t]here was no burial site in this community. The burial site is on an island across from Goddard Hot Springs channel." *Id.* at 53. However, she stated that she did not know whether there were remains on the island, since it had been "quite some time" since she was there last. *Id.* The Chilkat Institute concluded, for the following reasons, that BIA's investigation of the Goddard Burial Site was inadequate:

A short superficial survey, such as that carried out by unqualified BIA personnel, is inadequate to assess the physical remains of a burial at this site. A careful examination by experienced archaeologists, which were not involved in BIA's investigation, is called for in this instance. Since all surface indications of Tlingit habitation, such as any burial markers, were destroyed by a subsequent commercial developer at the site, an adequate site investigation should have included sub-surface testing. However, the BIA team did not attempt to undertake any archaeological survey. It will be necessary to conduct a complete survey of the island, including systematic sub-surface testing, to locate positively the physical remains of the burial(s). This survey should involve qualified archaeologists with substantial professional experience.

Id. at 54-55.

By decision dated March 7, 1988, BLM rejected Sealaska's selection application for the Goddard Burial Site as a cemetery site, reciting the reasons given in BIA's certificate of ineligibility.

In its statement of reasons (SOR) for appealing BLM's decision, Sealaska argues that Departmental regulations at 43 CFR 2653.5 establish a "presumption of validity for any Section 14(h)(1) application," and that the "application is to be given 'favorable consideration' if the site qualifies" (SOR at 6-7). Sealaska contends that "[b]y failing to give this application the type of favorable consideration and the presumption of

^{1/} The Chilkat Institute also "contend[s] the site qualifies as an historical place" (Chilkat Assessment at 47). Since Sealaska's selection application AA-40484 was for a cemetery site, we do not address this historical place argument.

validity required by Congress, the BIA violated its obligation to carry out the intent of Congress," and that "[i]t failed to perform an adequate and meaningful review and investigation of the site." Id. at 8-9. Sealaska incorporated into its SOR, in slightly modified form, the evaluation of the Goddard Burial Site contained in the Chilkat Assessment.

In its answer, BLM counters that there is neither a "presumption of validity" for a 14(h)(1) application, nor a requirement that every application be given "favorable consideration" (Answer at 6). In BLM's view, under 43 CFR 2653.5(a) "favorable consideration cannot be given unless the Secretary finds that the regulatory criteria is met." Id. Thus, BLM correctly decided that "[t]he Secretary cannot give favorable consideration to applications which are not eligible, 43 CFR 2653.5(a)." Id. at 6-7, quoting BLM Decision at 2.

According to BLM, "[t]he portion of Sealaska's cemetery site application embracing the site of Goddard Hot Springs includes land that has been privately owned for many years" (Answer at 8). This privately owned "land, within U.S. Survey 1401, was conveyed as a homestead by patent number 936888 in 1924" (see Memo from BLM to BIA's ANCSA Project Office, dated April 25, 1978). BLM maintains that such patented land is not available for selection as a cemetery site "since section 14(h)(1) of ANCSA limits selections to 'unreserved and unappropriated public lands' and privately owned, patented lands do not meet the ANCSA definition of 'public lands' as 'federal lands', 43 U.S.C. § 1602(e)" (Answer at 8).

Moreover, BLM emphasizes that BIA was unable to find "the slightest evidence of the existence of graves on the applied-for island." Id. at 9. According to BLM, "[t]his lack of a tangible, existing site, * * * precludes the BIA from certifying the site" under 43 CFR 2653.5(j)(1). Id. at 11.

On October 24, 1988, Sealaska filed an additional SOR and a request for a hearing. According to Sealaska, whether the Goddard Burial Site qualifies as a cemetery site under section 14(h)(1) of ANCSA "involves a material factual issue which would alter the disposition of the Bureau of Land Management's decision to deny Sealaska's application for the conveyance of this cemetery site" (Additional SOR at 2). Sealaska maintains that BIA should have conducted "subsurface testing" of the Goddard Burial Site. Sealaska's reasoning on this point is set forth below:

This is a cemetery site, yet the Bureaus[sic] did not do any subsurface testing. This is somewhat incredible given what was known about the site. The information of historic use of the site, combined with ethnographic information on the traditional location of cemetery sites indicates that there is a strong likelihood that the applied for site was a burial site (See Smythe Report [prepared by the Chilkat Institute], attached hereto as Exhibit B, pp. 4-6, and incorporated herein by this

reference). The historic use of the hot springs by the Tlingit, specifically for medicinal bathing, as described by several historical sources is acknowledged by the Bureaus. Id. The applied for site is part of an [sic] small island which was in closely [sic] proximity to the historic village that was situated at the hot springs prior to the turn of the century. This information, which was available to the Bureaus, supports the conclusion that this is a very likely spot for a Tlingit cemetery. Id. Yet, the Bureau conducted no subsurface testing.

(Additional SOR at 4-5). Sealaska concludes that this site was not adequately investigated by BLM and BIA.

In its additional answer, BLM responds that "[w]hether the BIA conducted a sufficient investigation is not a material factual question requiring a hearing on the eligibility of the applied-for-site. Rather, if the Board found the investigation insufficient a remand would be the appropriate remedy" (Answer at 2).

[1] Section 14(h)(1) of ANCSA, 43 U.S.C. § 1613(h)(1) (1982), authorizes the Secretary to withdraw and convey fee title to "existing cemetery sites" to the appropriate regional corporation. Regulation 43 CFR 2653.0-5(a) defines "cemetery site" as a "burial ground consisting of the gravesites of one or more Natives." In addition, 43 CFR 2653.5(j)(1) provides:

The Bureau of Indian Affairs shall certify specifically that the site is the burial place of one or more Natives. The Bureau of Indian Affairs shall determine whether the cemetery site is in active or inactive use, and if active, it shall estimate the degree of use by Native groups and villages in the area which it shall identify.

Sealaska's selection application described 14 acres which included patented land in the Hot Springs Bay area as well as the island where the burial was supposedly located. BIA and CPSU concluded that the vertical piece of lumber was not a Native grave marker, and there was no specific evidence that one or more Natives were buried on the island. See Report of Investigation at 7-8. We agree with BLM's argument that "[o]ral evidence of a burial on an island is not precise enough or sufficient enough to warrant making the entire island an eligible cemetery site" (Answer at 11). As BLM argues:

This lack of a tangible, existing site, also precludes the BIA from certifying the site. The BIA cannot "certify specifically that the site is the burial place of one or more Natives" (Emphasis added), as required by 43 CFR § 2653.5(j)(1) if it cannot find either the graves or a particular site. This is

particularly so when the requirement is to "certify specifically." Even though it made a thorough search of the applied-for island site, the BIA was not able to identify anything that could be specifically certified as a cemetery site.

(Answer at 11). BLM correctly points out that the consequence of not being able to identify the burial site is that "BIA will not be able to identify the site, including gravesites, on a map or on the ground as required by 43 CFR § 2653.5(j)," and that it "will not be possible to set the right buffer zone, as called for by 43 CFR § 2653.5(m), because the site the zone would buffer is not known" (Answer at 11).

[2] Sealaska, as the party challenging BLM's decision rejecting its selection application, bears the burden of establishing by a preponderance of the evidence that such decision is in error. Sealaska has simply failed to meet this burden. See, e.g., Minchumina Homeowners Association, 93 IBLA 169, 178 (1986).

[3] Under these circumstances, we deny Sealaska's request for a hearing to resolve the question as to whether BIA adequately investigated the claimed site. The following standard applies to appellant's request for a hearing:

[The appellant] apparently wishes to rehash the factual determinations which BLM has already made. It offers no showing that an administrative law judge would be better able to make a reasoned decision on the basis of an oral hearing than could BLM or this Board make on the existing record. No offer of further evidence has been made. A hearing is not necessary in the absence of a material issue of fact, which if proven, would alter the disposition of the appeal. E.g., Stickelman v. United States, 563 F.2d 413, 417 (9th Cir. 1977); United States v. Consolidated Mines & Smelting Co., 455 F.2d 432, 453 (9th Cir. 1971); Kim C. Evans, 82 IBLA 319, 323 (1984). This Board "should grant a hearing when there are significant factual or legal issues remaining to be decided and the record without a hearing would be insufficient for resolving them." Stickelman v. United States, supra at 417. In the instant case, the record does not reflect any significant factual or legal issues which warrant an oral hearing. [Emphasis added.]

Woods Petroleum Co., 86 IBLA 46, 55 (1985). Appellant criticizes BIA's investigation, but it does not assert that it has discovered any specific grave sites within the limits of its application.

Based upon the record, we affirm BLM's rejection of Sealaska's selection application for the Goddard Burial as a cemetery site under 43 CFR 2653.5(j)(1).

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Will A. Irwin
Administrative Judge

I concur:

James L. Burski
Administrative Judge